Supreme Court, U. S.
FILED
MAY 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1445

SIMONE MAUGNIE,

Petitioner,

vs.

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

Brief of Respondent, Compagnie Nationale Air France, in Opposition to Petition for a Writ of Certiorari.

JACQUES E. SOIRET, Esq.,
KIRTLAND & PACKARD,
626 Wilshire Boulevard, 6th Floor,
Los Angeles, Calif. 90017,
Counsel for Respondent,
Compagnie Nationale Air France.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Preliminary Statement 1

Respondent's Statement of the Case 2

Corrections to "Opinions Below" 2

Corrections to "Questions Presented" 2

1. Conclusions of Law of the United States District Court, Central District of California 2
2. Issue of Liability 3
   - A. (QP 2.—Pet. p. 3) 4
   - B. (QP 3.—Pet. p. 3) 4

"Statement" of Petitioner 5

- A. "Occurrence of Accident" [Pet. p. 5] 5
- B. Petitioner's So-Called "Basic Facts" [Pet. pp. 5 and 6] 5
- C. Conclusions of Law [Pet. p. 7] 6
- D. References to the MacDonald, Day and Evangelinos Cases 7

Argument 8

A Writ of Certiorari Should Not Be Granted to Petitioner Herein as a "Matter of Right" or Otherwise 8

1. Erroneous Statements by Petitioner 8
2. There Is No Conflict Between the Principal Cases Interpreting the "Embarkation-Disembarkation" Aspects of Article 17 of the Warsaw Convention 12

Page

A. The Day and Evangelinos Cases 12

B. The MacDonald and Hernandez Cases 13

C. The Present Case [Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir. Court of Appeals, 1977)] 14

Conclusion 15

TABLE OF AUTHORITIES CITED

Case Page

Evangelinos v. Trans World Airlines, decided Feb. 4, 1977 [550 F.2d 152 (USDA 3d) 7, 8, 9, 10, 12, 13, 14

Julio Jose Martinez Hernandez v. Air France, 545 F.2d 279 (U.S.C.A. 1st), decided Nov. 19, 1976, denied certiorari March 28, 1977 [Docket No. 76-1132; official citation not presently available] 7, 8, 10, 13, 14

MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971) 7, 9, 10, 11, 12, 13, 14, 15

Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir. Court of Appeals, 1977) .. 14

Miscellaneous

Warsaw Convention of 1929, Art. 17 .....8, 12, 14

Rules

Rules of the Supreme Court of the United States, Rule 23 1

Rules of the Supreme Court of the United States, Rule 24(1) 1

Rules of the Supreme Court of the United States, Rule 40(3) 1

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1445

SIMONE MAUGNIE,

Petitioner,

vs.

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

Brief of Respondent, Compagnie Nationale Air France, in Opposition to Petition for a Writ of Certiorari.

Respondent respectfully prays that the Petition of SIMONE MAUGNIE, for a Writ of Certiorari, to the United States Court of Appeals for the Ninth Circuit, to review the Judgment of said Court, entered in the above case on January 19, 1977, be denied.

Preliminary Statement.

Petitioner, SIMONE MAUGNIE, in her Petition for a Writ of Certiorari herein, has substantially complied with the provisions of Rule 23 of the Rules of this Honorable Court.

In accordance with the provisions of Rule 24(1) and Rule 40(3) of said Rules, respondent respectfully submits that the within cause should not be reviewed by this Honorable Court. In opposing petitioner's Petition for a Writ of Certiorari, respondent shall confine

itself herein to a "Statement of the Case", deemed necessary in correcting inaccuracies and omissions in the Statement of petitioner herein and an Argument in response to petitioner's purported reasons for granting the Writ as a matter of right [Petition for a Writ of Certiorari (hereinafter for convenience referred to as "Pet."), pp. 10 to 19, both inclusive].

Respondent's Statement of the Case.

As heretofore stated, respondent accepts, as substantially accurate (with the corrections hereinafter stated), those portions of petitioner's Petition herein entitled "Opinions Below", "Jurisdiction", "Questions Presented", "Statutes, Federal, and Regulations Involved", and "Statement". [Pet. pp. 1 to 9, both inclusive.]

Corrections to "Opinions Below".

The Opinion of the Court of Appeals, for the Ninth Circuit, in the case at bar, is now officially reported as "549 Federal Reporter, 2nd Series 1256 (CCA Ninth, 1977)".

Corrections to "Questions Presented".

1. Conclusions of Law of the United States District Court, Central District of California.

The pertinent Conclusions of Law of the United States District Court, Central District of California, the Honorable William Matthew Byrne, Jr., United States District Judge Presiding [Record on Appeal to the United States Court of Appeals, for the Ninth Circuit (hereinafter for convenience referred to as "ROA") p. 67], were and are:

"1. Actions under the Warsaw Convention can only be maintained for injuries suffered 'on board

the aircraft or in the course of any of the operations of embarking or disembarking.' Warsaw Convention of 1929, Article 17.

"2. Disembarkation operations are terminated once a 'passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal.' *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971).

"3. Since at the time of her accident, plaintiff had deplaned the Air France aircraft, had reached a safe point inside Orly Airport, and had proceeded a substantial distance enroute to the Swiss Air departure area, the injuries complained of were not suffered 'on board the aircraft or in the course of any operations of . . . disembarking.'

"4. Having as its foundation the treaty commonly known as the Warsaw Convention, the Complaint must be dismissed with prejudice in that the circumstances surrounding plaintiff's accident have been found to be outside Article 17 of those Rules."

2. Issue of Liability.

Regarding the issue of liability, the parties hereto stipulated, and said District Court ordered, that:

"1. There are basically two issues to be tried to the Court—

A. Does plaintiff's cause of action arise under and within the purview of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The 'Warsaw

Convention') and in particular did Plaintiff's accident hereinbelow described take place '. . . on board the aircraft or in the course of any of the operations of embarking or disembarking.'

B. Is contributory negligence available to defendant as a defense to liability in this case under the Warsaw Convention.

"2. That if the Court finds for defendant in respect of the first issue, i.e., that plaintiff's cause of action does not fall within the scope of the Warsaw Convention then plaintiff's cause of action should be dismissed with prejudice." [ROA, p. 65.]

Petitioner's "Questions Presented" (hereinafter for convenience referred to as "QP"), Nos. 2. and 3., are inaccurate in the following respects:

A. (QP 2.—Pet. p. 3).

None of the cases discussed by petitioner (including the case at bar) based its Decision merely upon the happening of an accident "inside an Airport Terminal". Therefore, this question is merely a corollary to petitioner's Question 1.

B. (QP 3.—Pet. p. 3).

None of the cases discussed by petitioner (including the case at bar) based its Decision, for or against liability, solely upon rigid definitions of, or artificial distinctions between, "operations of embarking" and "operations of disembarking".

"Statement" of Petitioner.

The "Statement" of petitioner [Pet. pp. 4 to 9 inclusive] should be corrected as follows:

A. "Occurrence of Accident" [Pet. p. 5].

Petitioner begs the question when she states that "injuries [were] sustained by petitioner as a result of an accident which occurred while petitioner was disembarking from respondent's Flight 004". Whether the accident took place in the course of any "operation of disembarking" is one of the principal disputed issues in this case.

B. Petitioner's So-Called "Basic Facts" [Pet. pp. 5 and 6].

Petitioner's recitation of said basic facts is substantially incorrect. The parties stipulated to the facts in this case and the District Court, in accordance therewith, found the pertinent facts to be as follows:

"5. On or about September 11, 1971, at approximately 9:30 p.m., the plaintiff departed from Los Angeles on defendant's flight 004 and arrived in Paris, Orly Airport, at approximately 4:20 p.m., on Sunday, September 12, 1971.

"6. That immediately upon exiting from defendant's aircraft, the passengers, including plaintiff, proceeded into the airport terminal.

"7. That in the hallway between the point of entry and the center of the airport terminal, the plaintiff proceeded onto the first of two moving sidewalks, the first one of which functioned and the second of which was under repair requiring the plaintiff to pass along side of it on foot.

"8. That somewhere between the beginning and the middle of the second and non-functioning moving sidewalk, plaintiff slipped either upon the floor of such hallway or upon the joint of the floor, and fell upon her back with her left leg folded under her.

"9. That at the time of her accident, the plaintiff was proceeding down the only passenger corridor from the Air France gate in the Orly Airport to the Swiss Air gate of said terminal for flight to Geneva, Switzerland, scheduled for departure 50 to 55 minutes after her arrival at Orly via defendant's flight 004 as aforesaid." [ROA, pp. 66 and 67.]

Thus, it is apparent, from these stipulated facts, that there are no facts supporting the Statement of petitioner in her petition herein [Pet. p. 6] that "the Air France ground crew" directed the exit of petitioner, nor do said facts support the assertion by petitioner that she "slipped" on "the highly polished floor". As stipulated by the parties, and found by the District Court, "somewhere between the beginning and the middle of the second and nonfunctioning moving sidewalk, [petitioner] slipped either upon the floor of such hallway or upon the joint of the floor, * * *" [Finding of Fact 8—ROA p. 66.]

C. Conclusions of Law [Pet. p. 7].

Respondent has heretofore, in its brief herein (page 3), set out the four conclusions of law pertinent to the issues herein discussed. Therefore, there is no need to be repetitive regarding this matter at this point in said brief.

D. References to the MacDonald, Day and Evangelinos Cases.

Petitioner, after brief references to portions of the *MacDonald, Day* and *Evangelinos* cases and (extensively edited) portions of the decision in the present case of the Ninth Circuit Court of Appeals, infers (erroneously, as hereinafter demonstrated in this brief) that said Ninth Circuit Court based its decision solely upon an artificially drawn distinction between "embarkation" and "disembarkation". [Pet. pp. 7 to 9, incl.]

The attention of this Honorable Court is also drawn to the fact that Petitioner has failed, in this section of her petition, to cite and discuss the very important First Circuit Court of Appeals case of *Julio Jose Martinez Hernandez v. Air France,* 545 F.2d 279 (U.S.C.A. 1st), decided November 19, 1976, involving injuries and death from an act of terrorism in the baggage retrieval area of the terminal building at Lod International Airport located near Tel Aviv, Israel. Your Court denied *certiorari* in this case on March 28, 1977 [Docket No. 76-1132; official citation not presently available].

This Honorable Court is also informed that a rehearing before the Third Circuit Court of Appeals *en banc* was held in the *Evangelinos v. Trans World Airlines* case on November 4, 1976, and a decision was rendered by said court on February 4, 1977 [550 F.2d 152 (USCA 3d)], affirming the underlying decision.

ARGUMENT.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO PETITIONER HEREIN AS A "MATTER OF RIGHT" OR OTHERWISE.

1. Erroneous Statements by Petitioner.

Petitioner is mistaken in speaking of the granting by your Honorable Court of a Writ of Certiorari as a "matter of right". Petitioner is only entitled to have your Honorable Court exercise its discretion with respect to the granting or non-granting of such a petition, and we respectfully submit that a review of the leading cases will serve to convince your Court that the petition should be denied.

The Petitioner claims that the decision of the Ninth Circuit Court of Appeals in this case interprets Article 17 of the Warsaw Convention so as to make an artificial distinction between "embarking" and "disembarking" passengers [Pet. p. 10]. As will be pointed out later herein, the present case (as well as the *Hernandez* and *Evangelinos* cases) employs a "tripartite test" based upon the question of control by the airlines and not merely upon a so-called "artificial" distinction between "embarkation" and "disembarkation". It so happens that movements of passengers upon "disembarkation" often present more evidence of a lack of control by the airlines than do those of passengers engaged in "embarkation".

At page 10 of her petition, Petitioner is again guilty of misstating the evidence in the instant case by asserting that "Petitioner was directed by the respondent's ground crew down the 'only passenger corridor leading from the Air France gate to the main terminal area.'" Not only does the Ninth Circuit Court of Appeals not so state, at page 2 of its opinion, but such statement is also contrary to the "Stipulated Facts" heretofore set out in this brief.

We are not aware of any record in the District Court that purports to support Petitioner's statement that "the wing of the airport into which she (Petitioner) was disembarking was in the exclusive use of Air France" [Pet. pp. 10 and 11]. Petitioner, in the District Court, saw fit to stipulate to the pertinent facts in this case and she is bound thereby, just as is the Respondent, and there is no such finding of fact in the stipulation nor the order of the court based thereon.

Petitioner is also drawing upon her imagination (rather than upon the stipulated facts) when she states (Pet. p. 11) that "Air France had control of her baggage and was in the process of transferring it to Swiss Air" [at the time of the accident]. At pages 11 and 12 of her Petition, petitioner attempts, apparently, to influence this Honorable Court by discussing the "relatively broad construction of Article 17" purportedly recommended by the Second Circuit Court of Appeals in the *Day* case [528 F.2d 31]. As Circuit Judge Wallace stated in his concurring Opinion in the present case, at page 11, "the *Day* test is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers." While any Circuit Court might conclude that the Warsaw Convention provisions should be liberally construed, the *Day* case cannot be interpreted as providing a construction thereof inconsistent with the Circuit Court Decisions in the *MacDonald, Hernandez* and *Evangelinos* cases and the Decision of the Ninth Circuit Court of Appeals in the present case.

Petitioner continues her effort to elicit the sympathy of this Honorable Court by stating [Pet. p. 14] "In the instant case, the Court of Appeals effectively advised petitioner that she should have sought recovery in France, from the Orly Airport authorities * * *." What petitioner is really saying, through her counsel, is that, having misjudged her ability to recover a potential $75,000 judgment through a cause of action based upon the Warsaw Convention, she probably should have sought recovery in France from the Orly Airport authorities.

In making the statement, at page 15 of her Petition, that [on the way to embark for her flight to Geneva, Switzerland] "at no time did she veer from the course set out by respondent's officials for her to follow in order to effect contact with her connecting flight nor was she ever out of their control and direction," petitioner has gone outside the record, insofar as she states her conclusionary allegations concerning her alleged control by respondent's officials.

There is no "clear conflict" between the *Day* and *Evangelinos* cases (in the Second and Third Circuits, respectively) and the *MacDonald* and *Hernandez* cases (First Circuit) and the present case (Ninth Circuit). While the *MacDonald* case used the more restrictive "location" test, it is apparent that the facts of that case would have withstood the application of the "tripartite test". As to the facts of the *Hernandez* case and the present case, they did stand the scrutiny of said "tripartite test," and thus, do not conflict with the purport of the decisions in the *Day* and *Evangelinos* cases. In fact, in Footnote 8 of the *Day* case [528 F.2d 31, 34] the Second Circuit Court of Appeals states "We find *MacDonald v. Air Canada,* 439 F.2d

1402 (1st Cir. 1971), cited to us by the appellant, clearly distinguishable. In *MacDonald,* the Court declined to construe Article 17 as covering an elderly passenger who fell after disembarking. Mrs. MacDonald was, at the time of her accident, standing near the baggage 'pickup' area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation."

At pages 16 through 18 of her Petition, Petitioner indulges in fantasy by suggesting unusual circumstances which would cause unfair results to injured parties "if the conflicting decisions herein set forth are permitted to stand".

At pages 18 and 19 of her Petition, petitioner seeks to bring to the consideration of your Honorable Court, potential litigation from recently occurring air accidents. Entirely apart from the impropriety of bringing into the present case issues yet to arise under circumstances not revealed in and by the record herein, nor presently available even to the judicial notice of this Honorable Court, it should be pointed out that the Canary Islands' airliner crashes and the Entebbe hijacking have no relationship to the question of "operations of embarking or disembarking", but are strictly limited to the damages, in each instance, that were sustained on board the aircraft.

2. There Is No Conflict Between the Principal Cases Interpreting the "Embarkation-Disembarkation" Aspects of Article 17 of the Warsaw Convention.

A. The Day and Evangelinos Cases.

Although they are in two separate Circuits, the *Day* and *Evangelinos* cases [cited *supra*] should present no problem to your Honorable Court vis-a-vis denying the Petition herein for a Writ of Certiorari.

Both cases arise out of the same set of circumstances, to wit: a terrorist attack at Hellenikon Airport in Athens, Greece. The injured and deceased passengers, at the time of the attack, had already surrendered their tickets, passed through passport control, and had entered an area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. They were required to stand in line, at the direction of TWA's agents, for the purpose of undergoing a weapon search, which was a prerequisite to boarding.

Therefore, both cases involved a clear case of "embarkation", without question. We have already pointed out Footnote 8 in the *Day* case [528 F.2d 31 at 34] and its acceptance of the *MacDonald* case construction of Article 17 as not applying to the passenger waiting at the baggage "pickup" area to recover her luggage.

The *Evangelinos* case [550 F.2d 152] emphasizes the "embarkation" aspects of the facts in that case and states, at page 156:

> "Neither *MacDonald vs. Air Canada,* 439 Fed. 2d 1402 (First Cir. 1971) nor the French case of *Maché vs. Air France,* Rev. Fr. Dr. Aér. 343 (Cour d'Appel de Rouen 1967), Aff'd. Rev. Fr. Dr. Aér. 311 (Cour de Cassation 1970) * * *, is inconsistent with the conclusion that the 'operations of embarking' had commenced at the time of the accident in this case. * * * *both cases involved disembarking, where the nature and extent of the carrier's control over the passenger and the type of activity in which plaintiff was engaged differed significantly from the case at bar.*" (Emphasis added.)

In Footnote 10, on page 156 of said *Evangelinos* case, it is stated:

> "The recent case of *Hernandez v. Air France,* 545 Fed. 2d 279, No. 76-1146 (1st Cir. 1976), makes clear that the First Circuit's earlier Decision in *MacDonald* is not in conflict with the conclusion which we reach here. In *MacDonald,* the plaintiff was injured while she was waiting for her baggage in the baggage claim area of Boston International Airport. She was in no sense under the control of the airline, or acting as a part of a group under direct airline supervision."

B. The MacDonald and Hernandez Cases.

As stated in our discussion of the *Day* and *Evangelinos* cases, *supra,* it clearly appears that the *MacDonald* case did not involve "disembarkation" where the injury occurred while the former passenger was waiting for her baggage at the baggage "pickup" location.

The *Hernandez* case (cited *supra*) involves a terrorist attack, *but one which occurred at a baggage retrieval area of the airport and some one-third to one-half miles from the point where the airplane was parked,*

where the passengers had already presented their passports to Immigration officials, and where the airline was not dictating to the passengers as to where they should go, or how they should proceed to pick up their baggage. This First Circuit Court of Appeals case states that said Court does not view its holding in the *MacDonald* case as necessarily foreclosing the adoption of the *Day-Evangelinos* tripartite test. While said First Circuit Court of Appeals stated that it believed that the nature of plaintiff's activity when injured, its location, and the extent to which the airline was exercising control over plaintiff at the time of the injury, are relevant considerations in determining the applicability of Article 17, on the facts of the *Hernandez* case, the application of these criteria required the conclusion that plaintiffs did not have a right to recover under Article 17.

C. The Present Case [Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir. Court of Appeals, 1977)].

We have already discussed herein, at some length, the facts of this case, which demonstrate that the plaintiff herein had left the disembarkation area of Air France and was on her way to pick up her baggage, preparatory to taking a Swiss Airline flight to Geneva, Switzerland. This is clearly neither an "embarkation", nor a "disembarkation", case. The Ninth Circuit Court of Appeals states, in its Opinion [p. 9]:

> "However, even under the more flexible interpretation of the language of Article 17, appellant's

> claim does not come within the scope of the Convention."

The majority opinion in the case at bar accepts the applicability of the tripartite test of the *Day* case under appropriate circumstances and, while Justice Wallace prefers the *MacDonald* case test, *i.e.*, the "location-of-the-passenger test", he concurs in the Decision of the majority, denying recovery to the petitioner herein.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACQUES E. SOIRET, Esq.,
KIRTLAND & PACKARD,
Counsel for Respondent,
Compagnie Nationale Air France.